

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSE A. ORELLANA,)	
)	No. CV-07-0165-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND REMANDING FOR
MICHAEL J. ASTRUE,)	ADDITIONAL PROCEEDINGS
Commissioner of Social)	PURSUANT TO SENTENCE
Security,)	FOUR 42 U.S.C. § 405(g)
)	
Defendant.)	
)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 12, 15.) Attorney Lora Lee Stover represents Plaintiff; Special Assistant United States Attorney L. Jamala Edwards represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands the matter to the Commissioner for additional proceedings pursuant to sentence four of 42 U.S.C. 405(g).

Plaintiff protectively filed for disability benefits and Supplemental Security Income benefits on June 5, 2002, alleging disability due to depression and back problems with an onset date of

1 November 2001. (Tr. 73-77, 84.) Following a denial of benefits at
2 the initial stage and on reconsideration, a hearing was held before
3 Administrative Law Judge (ALJ) Paul Gaughen on May 6, 2004. The ALJ
4 ordered additional consultative exams and continued the hearing; a
5 supplemental hearing was held on May 25, 2005. (Tr. 436-463, 464-
6 487.) Medical expert Allen Bostwick and vocational expert Daniel
7 McKinney testified at the supplemental hearing. (Tr. 468, 482.)
8 On October 22, 2005, ALJ Gaughen denied benefits and review was
9 denied by the Appeals Council. (Tr. 7-9, 388.) This appeal
10 followed. Jurisdiction is appropriate pursuant to 42 U.S.C. §
11 405(g).

12 **STATEMENT OF FACTS**

13 The facts are stated in detail in the transcript of proceedings
14 and are briefly summarized here. Plaintiff was 48 years old at the
15 time of the administrative hearing. (Tr. 48.) He testified he was
16 not married and lived with his mother, his brother and his brother's
17 spouse and daughter, his daughter and her children. (Tr. 443.) He
18 stated that he takes care of the grandchildren two to three hours a
19 day. (Tr. 442.) Plaintiff testified at the hearing that he only
20 went to second grade in El Salvador, his country of origin, and was
21 going to community college four days a week at the time of the
22 hearing for his graduate equivalency degree and English classes.
23 (Tr. 485-86.) He had past work experience as a commercial cleaner
24 and cook. (Tr. 85, 482.) He stated he quit his last job as a
25 school janitor due to back problems. He had worked there for eleven
26 years. (Tr. 443.) He testified that he had been going to Spokane
27 Mental Health center for counseling for the past eight years. He

1 was taking prescription drugs for depression. (Tr. 452-53.)

2 **ADMINISTRATIVE DECISION**

3 The ALJ found Plaintiff was insured for benefits through the
4 date of the decision and found at step one Plaintiff had not engaged
5 in substantial gainful activity since the alleged onset date. He
6 determined Plaintiff had impairments due to "symptoms of depression,
7 intermittent symptoms of anxiety and occasional back pain of
8 undetermined etiology," but these impairments did not significantly
9 limit Plaintiff's ability to perform basic work-related activities.
10 The ALJ determined "the claimant does not have a 'severe'
11 impairment." (Tr. 32.) He also found Plaintiff's allegations
12 regarding his symptoms and limitations were not credible and, at
13 step two, concluded Plaintiff was not disabled as defined by the
14 Social Security Act. (Tr. 33.)

15 **ISSUES**

16 The question presented is whether there was substantial
17 evidence to support the ALJ's decision denying benefits and, if so,
18 whether that decision was based on proper legal standards.
19 Plaintiff contends the ALJ erred when he (1) found no severe
20 impairments; (2) improperly rejected medical opinions of treating
21 psychiatrist Minerva Arrienda, M.D.; and (3) improperly rejected
22 his testimony. (Ct. Rec. 13 at 8.)

23 **STANDARD OF REVIEW**

24 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
25 court set out the standard of review:

26 The decision of the Commissioner may be reversed only if
27 it is not supported by substantial evidence or if it is
28 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
1097 (9th Cir. 1999). Substantial evidence is defined as

1 being more than a mere scintilla, but less than a
 2 preponderance. *Id.* at 1098. Put another way, substantial
 3 evidence is such relevant evidence as a reasonable mind
 4 might accept as adequate to support a conclusion.
 5 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
 6 evidence is susceptible to more than one rational
 7 interpretation, the court may not substitute its judgment
 8 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
 9 *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595,
 10 599 (9th Cir. 1999).

11 The ALJ is responsible for determining credibility,
 12 resolving conflicts in medical testimony, and resolving
 13 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 14 Cir. 1995). The ALJ's determinations of law are reviewed
 15 *de novo*, although deference is owed to a reasonable
 16 construction of the applicable statutes. *McNatt v. Apfel*,
 17 201 F.3d 1084, 1087 (9th Cir. 2000).

18 SEQUENTIAL PROCESS

19 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 20 requirements necessary to establish disability:

21 Under the Social Security Act, individuals who are
 22 "under a disability" are eligible to receive benefits. 42
 23 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 24 medically determinable physical or mental impairment"
 25 which prevents one from engaging "in any substantial
 26 gainful activity" and is expected to result in death or
 27 last "for a continuous period of not less than 12 months."
 28 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 from "anatomical, physiological, or psychological
 abnormalities which are demonstrable by medically
 acceptable clinical and laboratory diagnostic techniques."
 42 U.S.C. § 423(d)(3). The Act also provides that a
 claimant will be eligible for benefits only if his
 impairments "are of such severity that he is not only
 unable to do his previous work but cannot, considering his
 age, education and work experience, engage in any other
 kind of substantial gainful work which exists in the
 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 vocational components.

In evaluating whether a claimant suffers from a
 disability, an ALJ must apply a five-step sequential
 inquiry addressing both components of the definition,
 until a question is answered affirmatively or negatively
 in such a way that an ultimate determination can be made.
 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 claimant bears the burden of proving that [s]he is

1 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
2 1999). This requires the presentation of "complete and
3 detailed objective medical reports of h[is] condition from
4 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
5 404.1512(a)-(b), 404.1513(d)).

6 DISCUSSION

7 A. Step Two: Severe Impairments

8 At step two of the sequential process, the ALJ must conclude
9 whether Plaintiff suffers from a "severe" impairment, one which has
10 more than a slight effect on the claimant's ability to work. To
11 satisfy step two's requirement of a severe impairment, the claimant
12 must prove the existence of a physical or mental impairment by
13 providing medical evidence consisting of signs, symptoms, and
14 laboratory findings; the claimant's own statement of symptoms alone
15 will not suffice. 20 C.F.R. §§ 404.1508; 416.908. The effects of
16 all symptoms must be evaluated on the basis of a medically
17 determinable impairment which can be shown to be the cause of the
18 symptoms. 20 C.F.R. §§ 404.1529, 416.929. Once medical evidence
19 of an underlying impairment has been shown, medical findings are not
20 required to support the alleged severity of pain. *Bunnell v.*
21 *Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991). However, an overly
22 stringent application of the severity requirement violates the
23 statute by denying benefits to claimants who do meet the statutory
24 definition of disabled. *Corrao v. Shalala*, 20 F.3d 943, 949 (9th
25 Cir. 1994). Thus, the Commissioner has passed regulations which
26 guide dismissal of claims at step two. Those regulations state an
27 impairment may be found to be "non-severe" only when evidence
28 establishes a "slight abnormality" that has "no more than a *minimal*
effect on an individual's ability to work." *Id.* (Citing *Social*

1 *Security Ruling (SSR) 85-28*).

2 The step two inquiry is a *de minimis* screening device to
3 dispose of groundless or frivolous claims. *Bowen v. Yuckert*, 482
4 U.S. 137, 153-154 (1987). Further, the ALJ must consider the
5 combined effect of all of the claimant's impairments on his ability
6 to function, without regard to whether each alone was sufficiently
7 severe. See 42 U.S.C. § 423(d)(2)(B)(Supp. III 1991). The combined
8 effect "shall be considered throughout the disability determination
9 process." *Id.* The adjudicator's role at step two is further
10 explained by *SSR 85-28*:

11 A determination that an impairment(s) is not severe
12 requires a careful evaluation of the medical findings
13 which describe the impairment(s) and an informed judgment
14 about its (their) limiting effects on the individual's
15 physical and mental ability(ies) to perform basic work
16 activities; thus, an assessment of function is inherent in
the medical evaluation process itself. At the second step
of sequential evaluation, then, medical evidence alone is
evaluated in order to assess the effects of the
impairment(s) on ability to do basic work activities.

17 . . .

18 If . . . evidence shows that the person cannot perform his
19 or her past relevant work because of the unique features
20 of that work, a denial at the "not severe" step of the
21 sequential evaluation process is inappropriate. The
inability to perform past relevant work in such instances
warrants further evaluation of the individual's ability to
do other work considering age, education and work
experience.

22 *SSR 85-28*.

23 Here, the ALJ did not take vocational expert testimony
24 regarding Plaintiff's ability to do his past relevant work. He
25 found Plaintiff's medically documented depression, anxiety and back
26 pain did not cause more than minimal limitations in his ability to
27 work. (Tr. 32.) The ALJ gave reasons for rejecting medical

1 opinions that Plaintiff's condition caused marked and severe
2 limitations, (Tr. 27-29); however, the evidence is sufficient to
3 satisfy the "*de minimis*" threshold at step two. *Webb v. Barnhart*,
4 433 F.3d 683, 687 (9th Cir. 2005). Further, the Ninth Circuit has
5 held that where the objective evidence is incomplete, the ALJ has a
6 duty to supplement the record before rejecting a claimant's
7 application so early in the evaluation process. (*Id.*) Although the
8 ALJ ordered an additional orthopedic examination and used a medical
9 expert to resolve "disparate diagnoses" between treating and
10 examining psychological reports, (Tr. 462), medical expert Bostwick
11 testified that intellectual testing with a Spanish psychologist
12 would resolve some of the issues regarding Plaintiff's cognitive
13 functioning raised by the fluctuating responses on objective
14 testing. (Tr. 473-75.) Dr. Bostwick also suggested in cases where
15 an interpreter is used, that the interpreter be interviewed to
16 assess whether communication during testing was hindered by cultural
17 differences. (Tr. 475-76.)

18 Dr. Bostwick also testified Plaintiff did very poorly on the
19 Trails exams in February 2003, and the results indicated a severe
20 functioning impairment. Dr. Bostwick explained that the Trails A
21 and B exams were not neuropsychological; rather, they tested a
22 patient's visual perception. (Tr. 480-82.) The evidence indicates
23 Plaintiff could not see well due to an eye condition that was not
24 corrected until December 2003. (Tr. 264-65, 462.) Questions of
25 Plaintiff's cognitive abilities were raised by these test results;
26 however, it is unknown what, if any, impact Plaintiff's eye
27 condition had on his ability to complete the tests. (Tr. 213-14,
28

481.) Because of these ambiguities, additional intelligence testing, with appropriate consideration of the cultural and language differences, is necessary to assess language proficiency and cognitive functioning before a new sequential evaluation is conducted. See *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001).

B. Credibility Determinations at Step Two

The ALJ, examining psychologist Frank Rosekrans, and Dr. Bostwick expressed concerns over Plaintiff's credibility, citing inconsistent responses regarding education, past work, family constellation, and poor effort on parts of the psychological testing. (*E.g.*, Tr. 32, 298-99, 480-86.) The ALJ concluded that based on these inconsistencies, evidence of the Plaintiff's activities of daily living, and the medical evidence in its entirety, Plaintiff was not entirely credible. (Tr. 32.) However, for purposes of a step two finding, where there is no inconsistency between a claimant's complaints and the diagnoses of record from examining and treating doctors, a claim cannot be found "groundless" under the *de minimis* standard of step two. *Webb*, 433 F.3d at 688 (*c.f.* *Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005) (step two denial affirmed where record had contained no objective evidence and claimant's doctor hesitant to conclude symptoms and complaints were medically legitimate)).

Here, Plaintiff's complaints are consistent with the medical record in its entirety, which shows intermittent diagnoses of depression and anxiety (although there is no objective medical evidence of PTSD), medical opinions indicating moderate to marked

1 functional limitations, and testimony by the medical expert that
2 there was a medically determinable mental impairment of a depressive
3 disorder (Tr. 180, 187, 213, 472.) Further, the record is well
4 supported by mental health counseling notes and documentation of
5 medication treatment, indicating that Plaintiff's claims are more
6 than *de minimus* or frivolous. (Tr. 223-550, 278, 372.) Thus, there
7 is not the total absence of objective medical evidence necessary to
8 preclude a step two finding of a "severe" mental impairment. *Webb*,
9 433 F.3d at 688. The ALJ erred in finding no severe mental
10 impairment and ending the sequential evaluation at step two.
11 Because the issue of Plaintiff's ability to understand the
12 psychological testing in English, his ability to see during the
13 Trails testing and attendant questions about his cognitive
14 functioning, and the ALJ's failure to proceed with the sequential
15 evaluation, additional evidence is necessary (including vocational
16 expert testimony). Since it is not clear from the record before the
17 court that Plaintiff is disabled as defined by the Social Security
18 Act, remand for development of the record and additional proceedings
19 is appropriate. *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir.
20 2000); *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996).

21 While the Plaintiff may not be successful in proving he is
22 disabled, consideration of Plaintiff's limitations caused by severe
23 and non-severe impairments in combination, along with his language
24 proficiency and the effects of medication, is necessary to
25 determine whether Plaintiff is disabled as defined by the Social
26 Security Act. 20 C.F.R. §§ 404.1520, .1529; §§ 416.920,.929.
27 Accordingly,

2. Defendant's Motion for Summary Judgment dismissal (Ct. Rec. 15) is **DENIED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. The file shall be **CLOSED** and judgment entered for **Plaintiff**.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE